

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-6114

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

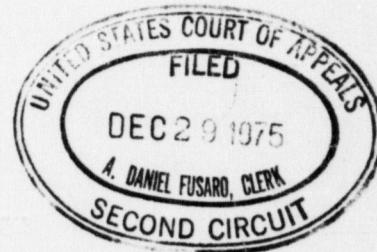
BRUBRAD COMPANY,

Appellant,

-against-

UNITED STATES POSTAL SERVICE,

Appellee.



JOINT APPENDIX

B P/S

BRADLEY B. DAVIS
Attorney for Appellant
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PAGINATION AS IN ORIGINAL COPY

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NR.	PROCEEDINGS	
75	Complaint filed. Summons issued.	(1)
75	Summons ret and file/executed.	(2)
5-75	By JUDD, J.-Order dtd 6-11-75 extending time to file answer complaint to 6-5-75 filed.	(3)
75	ANSWER filed.	(4)
.75	Notice of motion ret 7-18-75 for an order granting summary judgment filed with Memorandum of Law in support.	(5) (6)
.75	Pltff's supplemental memorandum of law filed.	(7)
.75	Before JUDD, J.-Case called and adj'd to 9-13-75.	
.75	Notice of Motion, ret. Sept. 5, 1975 filed re: to dismiss the action	(8)
'75	Memorandum of Law in Support of Above Motion filed.	(9)
.75	Affirmation in Opposition to Opp's Motion to Dismiss filed.	(10)
5	Before JUDD, J.-Case called. Motion for summary judgment argued. Decision reserved.	
75	By JUDD, J.-Memorandum and Order dtd 11/5/75 filed that the pltff's motion for summary judgment be denied, the defendant's motion to dismiss the complaint be granted and the Clerk of the Court enter judgment for the def. Copies sent to the parties.	(11)
1-75	JUDGMENT dtd 11-10-75 dismissing the complaint filed. (mg)	(12)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x
ERUERAD COMPANY,

Plaintiff,

75 C 325

- against -

UNITED STATES POSTAL SERVICE,

November 6, 1975

Defendant.

- - - - - x

Appearances:

D
PRADLEY B. DAVIS, Esq.
Attorney for Plaintiff

HON. DAVID G. TRAGER
United States Attorney
Attorney for Defendant

By: RICHARD L. HUFFMAN, Esq.
Assistant United States Attorney
of Counsel

J U D D, J.

MEMORANDUM AND ORDER

Cross motions have been made for summary judgment by the plaintiff and to dismiss by the defendant.

Facts

On November 4, 1969 plaintiff's predecessor,

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Brubrad Corporation, and the United States of America entered into a lease agreement for a store at 2934-36 Avenue X, Brooklyn, New York, to be used by the then Post Office Department. The lease was for an initial period of ten years at a rate of \$510 per month, with four five-year renewals at the option of the defendant-tenant, at the rates of \$475, \$500, \$525, and \$550 per month, respectively. Plaintiff is a partnership.

The terms of the lease were reached after a process of public bidding and negotiation. The original bid submitted by Brubrad Corporation was for \$545 per month, the lowest of three bids, but was accepted only after further negotiations which reduced the rent to \$510.

Plaintiff's complaint asserts that since 1964 "the enormous rates of inflation and consequent declining value of the dollar" have been both unprecedeted and uncontemplated by the parties. Plaintiff maintains that these economic developments have caused an "unfair hardship upon plaintiff" while unjustly enriching the defendant.

In affidavit supporting its motion for summary judgment, plaintiff asserts that the inflation and declin-

OPINION

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value of the dollar have been caused, at least in part, by the affirmative acts of the federal government in pursuing its fiscal and monetary policies.

The complaint asks for judgment reforming the terms of the lease so that the rentals shall "be deemed to read as being in terms of 1964 dollars to be adjusted at the 1974 renewal period and each subsequent renewal period in accordance with the alteration in the value of the dollar from base year 1964. . . ." In its briefs and oral argument, however, plaintiff retreats from the claim of reformation of the lease and asserts instead a right to have the lease interpreted so as to make an adjustment for inflation.

Plaintiff suggests various standards by which the court might make such an adjustment. Plaintiff first points out that the redemption of silver certificates for silver bullion was terminated on June 24, 1968, 31 U.S.C. § 405a-3, and that the value of silver has increased from \$1.29 per ounce to \$4.58 per ounce since the lease was executed. In its memorandum of law, it includes tables to show that \$610 a month is worth only about \$120 in terms of gold, and that wholesale prices have risen more than 50% and construction

OPINION

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costs more than 90% since 1967. On oral argument, counsel said that plaintiff was asking for damages from the date of the complaint at a rate of not more than \$800 per month, but gave no explanation of how the \$800 was computed. In its supplemental brief, plaintiff claims the right to damages based on the decrease in buying power of the dollar.

In the motion papers, plaintiff asked simply "that a hearing be conducted to determine the precise method of adjustment."

Discussion

Defendant's motion to dismiss under F.R.C.P. 12(c) may be granted only if the complaint fails to state a claim upon which relief could be granted under any legal theory.

Mitchell v. Hart, 41 F.R.D. 138 (S.D.N.Y. 1966).

The court concludes that the complaint must be dismissed, whether viewed as an action for reformation of the contract or as a suit for a declaratory judgment construing the contract.

Reformation

The law of contracts permits the reformation of

OPINION

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the express terms of a contract when the agreement between the parties is not accurately reflected in the express language of the contract, either through mutual mistake of the parties or fraud by one and mistake by the other.

A.L.I., 2 Restatement, Contracts § 504; 3 Corbin, Contracts §§ 608, 614 (1960); 13 Williston, Contracts, 3d ed. §§ 1547-49.

Reformation is intended only to enforce the objectives of the parties "according to their original agreement."

Mutual of Omaha Ins. Co. v. Russell, 402 F.2d 339, 344 (10th Cir. 1968), cert. denied, 394 U.S. 973, 89 S.Ct. 1456 (1969).

Such is not the case here. Plaintiff has not suggested that the parties intended the words of the contract to be other than what they are. Nor does plaintiff's theory of the case rest on the notion that the parties reached an express agreement other than that reflected in the written contract.

The Supreme Court has held, moreover, that inflation is not a ground for escape from contract terms.

Columbus Ry. Power & Light Co. v. City of Columbus, 241 U.S. 399, 414, 39 S.Ct. 349, 354 (1919).

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Change of Rent by Interpretation

Plaintiff's attempt to change its complaint from one for reformation to one for change of rent by interpretation of the contract is equally lacking in merit.

While plaintiff does not contend that the parties entered into an agreement on terms other than those in the lease, it argues that the meaning of those terms is different from the construction urged by the defendant. Plaintiff urges that the meaning of the phrase "annual rent 1 of Six thousand one hundred twenty . . . Dollars" in the 1964 ten-year lease meant that the rent should have a value each year (or at least in each renewal term) equivalent to the value of \$6,120 in 1964. On the basis of plaintiff's contention at one point that the value of the dollar has declined by 75 percent or more since 1964, its construction of the lease would mean that the 1974 rental would exceed \$24,000, or \$2,000 per month, far in excess of the claim it made on the oral argument.

Plaintiff's contention might be disposed of summarily by simply stating that the meaning of the word used in the ten-year lease is so plain as to preclude any

OPINION

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other interpretation. Such an approach is often adopted by courts in interpreting statutes as well as contracts. See, e.g., Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177 (1949); Bethlehem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456, 161 N.Y.S.2d 90, (1957); Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194 (1917).

There are occasions, however, where it is appropriate to go beyond the plain meaning of words in order to determine the underlying purpose of a statute or a contract. 3 Corbin, Contracts § 542 (1960); 9 Wigmore, Evidence § 2461 (3d ed.); Massachusetts Bonding Ins. Co. v. United States, 352 U.S. 128, 138, 77 S.Ct. 186, 191 (1956) (Frankfurter, J., dissenting); Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring).

The court in construing a provision of a contract should look to the contract in its entirety. In this regard, it is significant that the parties varied the rentals for the four five-year option periods following the initial ten-year lease. Presumably, these negotiated rentals looking to the future included the parties' estimates of the value of the lease, and of the dollar at those times. Given the

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conventional meaning of the term "dollar", as our basic unit of currency, it would seem fair to assume that, had the parties meant to set the rent in terms of "1964 dollars," they would have used words other than those they chose.

When construing a contract, the court may properly consider the circumstances of the parties at the time of negotiation and entering into the contract. Here there is no indication that the predecessors of plaintiff and defendant dealt in any fashion other than the proverbial "arm's length." While subsequent developments both in this country and abroad may have proved plaintiff's contract to be an unwise one, such misjudgment of the future, standing alone, does not justify altering the terms of the contract. This court does not understand plaintiff to contend, nor could it find, that this contract was unconscionable when made. Cf. U.C.C. § 2-302; Jones v. Star Credit Corp., 59 Misc.2d 189, 298 N.Y.S.2d 264 (S.Ct. Nassau County, 1960).

Plaintiff cites 31 U.S.C. § 311, which states the policy of the United States, "to continue the use of gold and silver as standard money. . . ." This section, however, has not been in force as to gold since 1934, when

OPINION

gold coins were withdrawn from circulation, 31 U.S.C. § 315b, and all inconsistent statutes were repealed. 31 U.S.C. § 446. As to silver coins, Section 311 has had no validity since the redemption of silver certificates was terminated in 1968. 31 U.S.C. § 405a-3.

The application of Section 311 to satisfaction of contract obligations is inconsistent in any event with 31 U.S.C. § 463, enacted in 1933, forty years after Section 311.

Section 463 reads:

"(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such revision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law." (Emphasis added).

OPINION

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Should this court accept plaintiff's proffered construction, it would in effect be giving the plaintiff the "right to require payment in . . . a particular kind of coin or currency, or in an amount of money of the United States measured thereby," To adopt such a construction would violate public policy as declared by Congress.

Section 463 was applied in Avery v. J. L. Hudson Co., 17 Mich. App. 491, 169 N.W.2d 666 (Ct. of Apps. 1969). In that case, the landlord sued for the adjusted rent on a 99-year lease.

Plaintiff's reliance upon Perry v. United States, 294 U.S. 330, 55 S.Ct. 432 (1935), is unavailing. In Perry, the Court recognized that Congress could not after the fact repudiate a binding obligation previously entered into by it, to pay principal and interest on government bonds "in United States gold coin of the present standard of value." In the present case, the statute invalidating provisions such as that advanced by plaintiff was on the books long before the lease was signed. Plaintiff would distinguish the Perry case because in that case there had been no decrease in the dollar's purchasing power, and therefore no damages; but the

OPINION

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loss in purchasing power since 1964 in this case creates no rights in plaintiff, in the light of the policy set forth in 31 U.S.C. § 463. Even if policies of the federal government have caused the current inflationary increase in prices, the policies were the result of Congress' exercise of its legislative powers under Article I, Section VIII of the Constitution, and give rise to no private rights.

It is also proper to consider the impact which acceptance of plaintiff's contentions would have on many other long-term government obligations. The New York Times of November 4, 1975, lists eleven series of United States government bonds with maturities from 1980 to 1998 and coupons from 3 percent to 4-1/4 percent. Their holders might make the same argument as plaintiff, that they did not contemplate the present inflation when the bonds were issued. Plaintiff, like bondholders and other creditors of the government, is entitled under 31 U.S.C. § 463 only to "payment, dollar for dollar, in . . . legal tender."

Cases cited by plaintiff about consideration of inflation in fixing damages for torts have no bearing on the amount of defendant's lease obligations.

OPINION

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The burdens of inflation do not rest alone on holders of long-term government obligations. Inflation has the effect of a capital levy on owners of many forms of property, and of an ungraduated income tax on all persons living on fixed incomes. Sorting out how much of inflation is attributable to deficit budgets to finance essential federal programs, how much results from oil price increases by OPEC countries, how much from uncontrolled collective bargaining agreements, and how much from other domestic and international causes, would be a fearsome task. A court should not, without Congressional guidance, single out a particular landlord or other victim of inflation to be compensated at the expense of all the other taxpayers in the United States.

For all of the foregoing reasons, it is ORDERED that the plaintiff's motion for summary judgment be denied, the defendant's motion to dismiss the complaint be granted, and the Clerk of Court enter judgment for the defendant.

0.

S.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRUBRAD COMPANY,

Plaintiff,

COMPLAINT

-against-

UNITED STATES POSTAL SERVICE,

Defendant.

Plaintiff, for its verified complaint, by
BRADLEY B. DAVIS, its attorney, alleges as follows:

1. Jurisdiction is founded upon a federal question
pursuant to 39 U.S.C. 409 because the
defendant is the United States Postal Service

2. Venue lies within the jurisdiction of the United
States District Court for the Eastern District of New
York because (1) that is where plaintiff's office and
principal place of business is located; (2) this action
concerns real property which is located within the
jurisdiction of this Court.

3. Brubrad Company, a partnership, with its offices
in the County of Nassau, State of New York, is the
successor in interest to Brubrad Corporation, a domestic
corporation with its offices and principal place of business
at the same address.

4. In and about November 5, 1964, the parties entered
into a lease as per annexed Exhibit A for the rental of
premises 2934-6 Avenue X, Brooklyn, New York, at a rental
of \$6,120 per annum for ten years with successive renewal
options for five year periods at \$5,700, \$6,000, \$6,300 and

COMPLAINT

\$6,600 respectively, the first of which options having been exercised in 1974.

5. Neither at the time of negotiation of the lease nor at the time it was executed did either of the parties contemplate the enormous rates of inflation and consequent declining value of the dollar which would occur in the lease and option period.

6. Because of this unprecedented inflation rate and consequent decline in the value of the dollar, all costs for the maintenance of the property, as well as taxes, sewer and water charges, have increased enormously so that the rental as set forth in the lease now causes unfair hardship upon plaintiff not in the contemplation of either party at the time the lease was negotiated and executed.

7. In fact because of this same inflation, the defendant has sought and obtained numerous increases in its various rates in the 11 year period since the lease was entered into.

8. By continuing to pay rents in terms of 1964 dollars at the same time plaintiff's expenses are being reflected in 1974 dollars, defendant is being unjustly enriched at plaintiff's cost.

WHEREFORE, plaintiff demands judgment reforming the terms of the lease so that the various rent sums set forth therein be deemed to read as being in terms of 1964 dollars to be adjusted at the 1974 renewal period and each subsequent renewal period in accordance with the alteration in the value of the dollar from base year 1964 determined by such objective standards as this Court may deem proper, together with such other and further relief as this Court may deem proper.

AGREEMENT TO LEASE

March 11, 1964.

#1

1. The undersigned hereby agree(s), upon acceptance by the Government, to lease for postal purposes the premises described below for a term of ten (10) years from , 19 , or date thereafter of completion of building or any contemplated improvements, additions, repairs or remodeling, etc., which completion date shall not be later than 120 nor before calendar days after acceptance of this bid. The annual rental shall be One Thousand Five Hundred Forty dollars (\$1,540.), payable in equal installments at the end of each calendar month. \$6170.

2. The property to be leased is located at:

Street and No. 2934-2936 Avenue X Municipality Brooklyn

County Kings State New York

More particularly described as: (Legal Description)

ALL that certain room, providing approximately 1,539 square feet of floor space on the first floor, net, inside measurements, of the one-story masonry premises situated on the south side of Avenue X, between Nostrand Avenue and Haring Street on Lot #2, Block 7422 in

Brooklyn, Kings County, New York

upon which is or will be located a one (1) story masonry

building known as Brooklyn, New York (Nostrand Station)

Room Numbers , and which property contains areas and spaces, improvements and appurtenances as shown on attached drawing #NY 64-1518

dated 2-28-64. Unless otherwise specified, the Government shall have the exclusive use and occupancy of the spaces and areas shown on the attached described drawing.

Common use of compacted cinder parking area consisting of approximately 4,533 square feet (41'2½" x 110') at the rear of Post Office premises with entrance from Haring Street. This area is to permit ingress and egress of mail vehicles for the receipt and dispatch of mail matter.

3. The undersigned agree(s), in consideration of the aforesaid rental, to furnish and pay for the following: ~~heat, light, water, sewerage service.~~ *Or - Considered included.*

Lessors shall furnish heating system of sufficient size and capacity to maintain uniform temperature of 70 degrees Fahrenheit in all areas based on the design temperature commonly in use in the locality.

(continued on Page 2)

4. The undersigned agree(s), in consideration of the aforesaid rental, to furnish and provide the premises herein described in accordance with the preliminary drawings, the Construction Requirements for Leased Post Office Facilities, and as specifically enumerated in all addenda attached as riders to this agreement.

5. The undersigned further agree(s) in consideration of the aforesaid rental to maintain the premises and items furnished in this agreement in good repair and proper condition during the continuance of the lease.

LEASE

BROOKLYN, NEW YORK
NOSTRAND STATION

Lessors agree to provide and replace all ballasts as needed during the continuance of the lease.

Lessors shall furnish air conditioning equipment of sufficient size and capacity, maintenance of said equipment, including but not limited to the necessary refrigerant and filters, to maintain temperatures within the building of 78 degrees to 81 degrees, Fahrenheit, dry bulb, and 45% to 50% relative humidity in all areas based on the design temperature commonly in use in the locality.

Lessors agree to furnish and pay for all water and sewerage service during the continuance of the lease.

INITIALS: AT

INITIALS: _____

(Page 2)

LEASE

6. Consecutive and separate renewal options, following expiration of the above mentioned basic term, are offered for the following terms and rentals, all other terms and conditions of the basic lease to remain the same:

<u>Five (5)</u>	years at \$ <u>5700</u>	per annum
<u>Five (5)</u>	years at \$ <u>6000</u>	per annum
<u>Five (5)</u>	years at \$ <u>6300</u>	per annum
<u>Five (5)</u>	years at \$ <u>6600</u>	per annum
	years at \$ _____	per annum
	years at \$ _____	per annum

The Government will give sixty (60) days' notice of exercise of any renewal option.

7. Delays in completing any building, repairs, additions, improvements or remodeling, or in the installation of equipment and furnishings under this agreement, due to unforeseeable causes beyond the control and without fault or negligence of the undersigned, including but not restricted to acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, shall be excused if the undersigned shall, within 10 days from the beginning of any such delay (unless the Regional Real Estate Manager or his duly authorized representative shall grant a further period of time), notify the Regional Real Estate Manager of the Post Office Department, or his duly authorized representative, in writing, of the causes of delay, who shall ascertain the facts and the extent of delay and the extent of the time for completing the building, repairs, or any improvements, additions, or remodeling, or installation of equipment and furnishings, when in his judgment the findings of fact justify an extension and his findings of fact thereon shall be final and conclusive unless the undersigned shall appeal in writing to the Postmaster General within 30 days from receipt of the findings of fact. The decision of the Postmaster General or his duly authorized representative shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent or arbitrary or capricious or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence: PROVIDED, That if no such appeal to the Postmaster General is taken, the decision of the Regional Real Estate Manager shall be final and conclusive. In connection with any appeal proceeding under this clause, the undersigned shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision on an extension of time hereunder, the undersigned shall proceed diligently with the performance of the contract and in accordance with the Regional Real Estate Manager's decision. Inability to comply with State, city or local construction or zoning laws or ordinances, or with restrictive covenants, shall not be regarded as an unforeseeable cause, PROVIDED HOWEVER, that if the undersigned shall acquire the demised property, an interest therein or an option to purchase the same by or through assignment or transfer from the Postmaster General or his duly authorized representative, and if in the course of such acquisition the undersigned is unable to comply with such laws or ordinances or restrictive covenants, then this agreement shall be and become terminated with no further liability on the part of either party unless such laws or ordinances or restrictive covenants are suitably changed or removed in accordance with an option or other agreement with the owner which so provides.

8. In connection with the performance of work under this contract, the undersigned agrees not to discriminate against any employee or applicant for employment because of race, religion, color or national origin. The aforesaid provision shall include, but not be limited to the following: Employment; upgrading; promotion; or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The undersigned agrees to post hereunder in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause.

9. The undersigned further agrees to insert the foregoing provisions in all sub-contracts hereunder, except sub-contracts for standard commercial supplies or raw materials.

10. When the bidding is confined to an optioned site, successful bidder agrees to accept an assignment of the option and to exercise the same in accordance with its terms.

11. This bid is subject to the provisions outlined on the reverse of this form, entitled, "Information For Bidders," which has been carefully read and approved by the undersigned. The undersigned is legally qualified to execute a lease to the Government, has read the Lease, P.O.D. Form 1449, appearing on the reverse of this form, and approves same with the exceptions of the following paragraphs which are to be added or deleted before execution of the lease:

The last unnumbered paragraph, being the non-discrimination clause, shall be deleted and substituted therefor with "Non-Discrimination Clause - POD Form 1421, August 1963".

Clauses (a) and (b) of Paragraph 10 are to be deleted.

12. The undersigned further agrees that the following paragraphs are added as riders and become a part of this agreement: 13, 14, 15, 16 and 17.

13. POD Form 1421, Non-Discrimination Clause, shall be substituted in lieu of Paragraph 8, above.

14. POD Form 1421-A, Jan. 1964, Equal Employment Opportunity Representations, has been executed and is made a part of this proposal.

15. The attached Tentative Plan, Nostrand Station, Brooklyn, N.Y., identified as "DWG. NO. N.Y. 64-1513, dated 2/23/64", is made a part of this proposal.

16. The number of employees in bidder's organization is _____.

17. The terms and conditions of this Agreement to Lease and any modification or amendment thereto shall be incorporated in the lease.

AMENDMENT TO LEASE

April 22, 1964

Postmaster General
Washington, D.C. 20260

We hereby amend our Agreement to Lease dated March 11, 1964
as follows:

For the basic ten (10) year lease the
annual rental shall be \$6,120.00 per
month.

Except as modified above, the terms and provisions of said
Agreement to Lease shall remain in full force and effect.

BRIERAD CORPORATION

By: 
Philip Davis, President

ANSWER

The defendant, UNITED STATES POSTAL SERVICE, by its attorney, DAVID G. TRAGER, United States Attorney for the Eastern District of New York, in answering the complaint herein, alleges:

FIRST: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs designated "2", "3", "5", "6" and "7" of the complaint.

SECOND: Denies each and every allegation contained in paragraph designated "8" of the complaint.

THIRD: Admits the allegations contained in paragraph designated "4" of the complaint.

FIRST DEFENSE

FOURTH: The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

FIFTH: This Court is without jurisdiction over the subject matter of this action.

AS AND FOR A COMPLETE AND
SEPARATE AFFIRMATIVE DEFENSE

SIXTH: This action was not commenced within the applicable time period and is therefore barred by the statute of limitations.

WHEREFORE, the defendant demands judgment dismissing the complaint and granting judgment to it, together with its costs and disbursements, and for such other and further relief as to the Court may seem just and proper.

Dated: Brooklyn, New York
June 2nd 1975.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRUBRAD COMPANY,

Plaintiff,

75 Civ. 325

-against-

NOTICE OF MOTION

UNITED STATES POSTAL SERVICE,

Defendant.

S I R :

PLEASE TAKE NOTICE THAT upon the annexed affirmation of BRADLEY B. DAVIS dated the 8th day of July, 1975 and the affidavit of LEONA DAVIS sworn to the 1st day of July, 1975, plaintiff will move this Court, at a Motion Part thereof, to be held before the Hon. Orrin G. Judd, at the United States Eastern District Courthouse, 225 Cadman Plaza East, Brooklyn, N.Y., Room 11, on the 18th day of July, 1975 at 10:00 A.M. for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment to plaintiff as to liability and setting the matter for a hearing as to the amount of damages, together with such other and further relief as this Court may deem proper.

Dated: New York, N.Y.
July 8, 1975

To: DAVID G. TRAGER
United States Attorney
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, N.Y.

Yours, etc.
BRADLEY B. DAVIS
Attorney for Plaintiff
1235 Park Avenue
New York City 10028
212-876-1609

AFFIDAVIT IN SUPPORT OF BRUBRAD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRUBRAD COMPANY,

Plaintiff,

-against-

75 Civ. 325

UNITED STATES POSTAL SERVICE,

Defendant.

State of New York) ss:
County of New York (

BRADLEY B. DAVIS, an attorney-at-law admitted to practice in the Eastern District of New York, and attorney for the within plaintiff affirms the following under penalties of perjury.

The facts in this case are not in dispute. Plaintiff is the owner of property at Avenue X in Brooklyn, New York in which the defendant is a tenant. The parties entered into a lease in November, 1964 providing for a rental of \$6,120 (\$510 per month) per annum for ten years, followed by successive renewal options of \$5,700 per annum (\$475.00 per month) for five years, \$6,000 per annum (\$500 per month) for five years, \$6,300 per annum (\$525 per month) for five years; and \$6,600 per annum (\$550 per month) for five years. Thus, at present the rent is lower than it was eleven years ago, and even in 1990 will be less than 10% higher than starting rent.

It is plaintiff's contention that neither of the parties contemplated the huge inflation that has occurred since 1964 and the consequent devaluation of the dollar. Thus, while the parties contemplated a relatively constant rent, in fact because of the decline in the value of the dollar, the rental has drastically declined. The extent of this decline is detailed in the accompanying brief. Plaintiff

AFFIDAVIT IN SUPPORT OF BRUBRAD

is requesting that the lease be read in terms of the 1964 dollars which were being considered by the parties at the time the lease was entered into, and that the sum payable in 1975 and subsequent years dollars be adjusted accordingly.

The precise method of adjustment is obviously something on which the parties will differ and therefore on which a hearing will be necessary. However, on the underlying issue of whether there should be an adiustment because of the changing value of the dollar, there are no facts in dispute. Therefore, this portion of the case is ripe for summary judgment.

Defendant cannot dispute that inflation over the past ten years exceeds anything that has happened in our prior history and therefore cannot have been contemplated by the parties when they entered into the lease. Indeed, as the accompanying brief shows, this inflation has caused great changes in defendant's own postal rates: because of the change in the value of the dollar, a letter which cost five cents to send in 1964 now costs ten cents, and defendant is right now in the process of seeking even further increases.

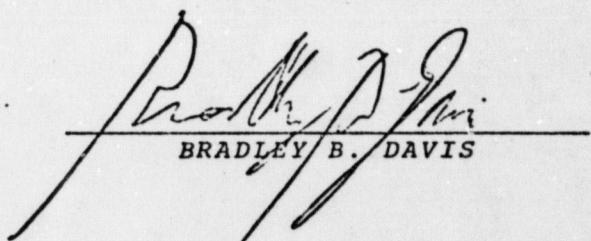
Plaintiff is not seeking to change the terms of the lease: it simply is seeking to effectuate the understanding of the parties by keeping the rents as the parties contemplated them in 1964. Obviously if the United States changed its unit of currency, the lease would be changed accordingly. While we happen to call our unit of currency by the same name that we used in 1964, for the reasons set forth in the accompanying brief, in fact it is not the same when measured by any objective standard.

WHEREFORE plaintiff respectfully requests that the Court grant summary judgment that the sums set forth in the lease represent 1964 dollars and that the sum payable in 1975 and subsequent years be

AFFIDAVIT IN SUPPORT OF BRUBRAD

adjusted accordingly, and that a hearing be scheduled to determine the precise method of adjustment. A copy of the pleadings is annexed hereto. No previous application for the relief sought herein has been made.

Dated: New York, N.Y.
July 8, 1975



BRADLEY B. DAVIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRUBRAD COMPANY,

Plaintiff,

75 Civ. 325

-against-

AFFIDAVIT

UNITED STATES POSTAL SERVICE,

Defendant.

State of New York) ss:
County of New York, (

LEONA DAVIS, being duly sworn, deposes and says:

I am a partner of the within plaintiff, and in 1964 was an officer and shareholder in BRUBRAD CORPORATION, its predecessor. At the time the lease with defendant was negotiated, its terms were discussed with the officers and stockholders. It was our understanding that this lease would provide for a relatively constant rent and rate of return, and it was only with this understanding that the lease was approved and executed.

This affidavit is being made by me and not by Philip Davis, my husband and the person who signed the lease, because he subsequently suffered a severe stroke and is unable to write or speak. However, I am certain that the above also was his understanding.

Leona Davis
LEONA DAVIS

Sworn to before me this
1st day of July, 1975


BRADLEY B. DAVIS
Notary Public, State of New York
No. 39-0974250
Qualified in Nassau County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRUBRAD COMPANY,

Plaintiff,

-against-

UNITED STATES POSTAL SERVICE,

Defendant.

STATEMENT PURSUANT TO RULE 9(g)

1. In 1964, the predecessors in interest to the parties entered into a lease for space at Avenue X, Brooklyn, N.Y., at an initial annual rental of \$6,120 for the first ten years, with four five-year renewal options (the option to be exercised at the discretion of defendant) at annual rentals of \$5,700, \$6,000, \$6,300, and \$6,600 respectively.
2. Defendant is still in occupancy of the aforesaid premises, having duly exercised its first renewal option.
3. In 1964, dollars were silver certificates, and could be redeemed freely for silver by the United States at a rate of \$1.2929 per ounce. This continued for several years thereafter.
4. Subsequent to 1968, the United States devalued the dollar both in terms of silver and of gold.
5. The standard of currency of the United States is bimetallic (silver and gold) as it was in 1964.

BRADLEY B. DAVIS
Attorney for Plaintiff

CIS-RLH:ec
F. #750702

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

BRUBRAD COMPANY,

Plaintiff,

- against -

UNITED STATES POSTAL SERVICE,

Defendant.

NOTICE OF MOTION
TO DISMISS
PURSUANT TO
F.R.C.P. RULE 12(c)

Civil Action
No. 75 C 325

X

S I R S :

PLEASE TAKE NOTICE that the defendant will move this court before the Honorable Orrin G. Juad, United States District Judge, in the United States District Courthouse, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York on the 5th day of September 1975 at 10:00 in the forenoon, or as soon thereafter as counsel may be heard, for an order dismissing the action for failure to state a claim for which relief can be granted and for such other relief as is just, proper and equitable.

Dated: Brooklyn, New York
July 11, 1975

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By:


RICHARD L. HUFFMAN
Assistant U. S. Attorney

AFFIDAVIT

State of New York
County of New York ss.

I, Mr. Herbert H. Doddato, Area Real Estate Manager, U. S. Postal Service have reviewed the file and lease agreement pertaining to the post office leased premises located at 2934-2936 Avenue X, Brooklyn, New York. As a result of this review it has been determined:

1. The United States Postal Service has been and will continue to furnish and pay for fuel for the demised premises.
 2. The United States Postal Service has been and will continue to pay electric utility costs for the demised premises.
 3. Attached hereto is copy of Real Estate Officer Joseph J. Licari's Lease Bid Analysis dated April 1, 1964 pertaining to this case.
 4. Also attached is copy of accepted Agreement to Lease along with letter of amendment dated April 22, 1964 from the bidder, Brubard Corporation, reducing the rental for the basic 10 year lease period to \$6,120.00 per annum.

Herbert H. Doddato

Sworn to before me
this 24th day of July 1975

SEYMOUR WEINER
NOTARY PUBLIC STATE OF NEW YORK
NO. 60-4195455
QUALIFIED WESTCHESTER COUNTY
TERM EXPIRES MARCH 30, 1977

POST OFFICE DEPARTMENT LEASE BID ANALYSIS		DATE 4/8/64	ORDER NO. LO-2-64-27	
FACILITY Post Office Nostrand Station-Proposed	CITY Brooklyn	COUNTY Kings	STATE New York	
FROM REAL ESTATE OFFICER Joseph J. Licari New York, N.Y. 10111				
NO. OF BIDS 3	BIDS BY NUMBER ELIMINATED FOR: SERVICE REAL ESTATE 2		BIDS TO BE CONSIDERED #1	RECOMMENDED BID #1
	NEW FACILITY <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	EXPIRATION DATE -	<input type="checkbox"/> NEW CONSTRUC- TION <input checked="" type="checkbox"/> EXISTING BUILDINGS <input type="checkbox"/> BOTH	INCLUDED <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
EXPLANATION OF TAX ESCALATION: <i>[Handwritten note: JK 4/27/64 cpl]</i>				

GENERAL COMMENTS: Cover those subjects in brief narrative which are not covered in this analysis, but which are necessary in order to arrive at a sound conclusion. Suggested subjects: (1) List, if any, non-resident alien bidders; (2) Public sentiment; (3) Advantages and disadvantages of bids; (4) Competition; (5) Lease term; etc.

An advertisement, soliciting bid proposals for postal quarters to be occupied by the proposed new facility to be known as Nostrand Station, was issued from February 11, 1964 to March 6, 1964. As a result, three (3) responsive bids were received.

The first bid received was from Brubrad Corporation of 200 West 27th Street, New York, N.Y. (Bidder #1). The annual rent proposed under the ten (10) year basic lease term was \$6,540.00 and those requested for the four (4) five (5) year optional renewal terms were \$5,700.00, \$6,000.00, \$6,300.00 and \$6,600.00 per annum, respectively.

A second bid was tendered by Joange Building Corporation, 3858 Nostrand Avenue, Brooklyn, New York (Bidder #2) whose proposals were \$6,750.00 per annum during the basic lease term of ten (10) years and \$7,425.00, \$7,425.00, \$8,100.00 and \$8,100.00 per annum for the four (4) consecutive five (5) year renewal options, respectively.

Bidder #3, Wesley A. Roche, as partner with William Lande and Attorney for Nettie Match and Estate of Samuel Match, c/o Harry M. Lewis Company, Inc., 189 Montague Street, Brooklyn, New York, submitted bid proposals of \$7,200.00 per annum, for the basic lease term of ten (10) years, and \$7,400.00, \$7,600.00, \$7,800.00 and \$8,000.00 for the same optional renewal terms, respectively.

All of the proponents are offering existing vacant stores. In addition, said stores require extensive improvements and alterations to meet our requirements for postal use. Incomplete cost estimates obtained by the bidders indicate that the improvements and alterations to said stores will involve expenditures ranging from \$9,000.00 to \$15,000.00, depending on condition of each bidder's premises. The prevailing practice in the area is to rent premises in "as-is" condition and to require the lessees to

renovate the newly rented premises before occupancy. It will follow necessarily that the proposals relating to postal use of the bidders' quarters will reflect amortization of cost of improvements and alterations.

SUBJECT: LEASE BID ANALYSIS - BROOKLYN, NEW YORK LO-2-64-27 4/8/64
Nostrand Station - Proposed

REQUIREMENTS:

Under date of December 17, 1963, the Space Requirements Branch requested that action be initiated to secure premises having 1,344 square feet, net interior, for a proposed establishment of a finance station to be known as Nostrand Station, within 300 feet east or west of Nostrand Avenue, between Avenues "W" and "Y". In the request, it was stated that "exterior areas will not be required".

On the basis of lesser interest developed within the preferred operating perimeter, the Engineering Branch was requested to prepare tentative plans for the proposed quarters located at 2934-2936 Avenue "X". These plans are identified as "Dwg. No. N.Y. 64-1518, dated 2/28/64". With respect to other premises, it was stipulated that excepting actual dimensions, they should conform as close as possible to said plans and specifications.

ANALYSIS OF BID PROPOSALS:

Proposal of Bidder #1 (Brubrad Corporation) requires a rental of \$6,540.00 per annum during the basic lease term of ten (10) years for proposed modern quarters comprising approximately 1,539 square feet of first floor space, net interior. This is equivalent to \$4.25 per square foot, but it includes the utilities of water and sewerage service, requires complete maintenance by the lessor, provides for air conditioning equipment and makes available to the Government an area to the rear of the postal premises comprising approximately 4,533 square feet, permitting ingress and egress of mail vehicles for the dispatch and receipt of mail matter. The four (4) separate and consecutive five (5) year optional renewal terms require annual rentals at square foot rate of \$3.70, \$3.90, \$4.09 and \$4.29, respectively, with identical provisions. The rentals under the renewals reflect the reduction resulting from ten (10) year amortization of improvements and provision for slight increases to offset anticipated higher real estate taxes.

On an adjusted basis - allowing 15¢ per square foot for air conditioning equipment, a flat \$100.00 for water and sewerage service, and 15¢ per square foot for interior and exterior maintenance, the rental of the proposed postal premises at 2934-2936 Avenue "X" (Brubrad Property) is equivalent to \$3.88 per square foot. This figure includes amortization of improvements and special purpose equipment equal to approximately 50¢ per square foot.

Subject quarters are ideally located in the center of the preferred operating perimeter, approximately eighty (80) feet from the southeasterly intersection of Nostrand Avenue and Avenue "X". In fact, it is the only one of the three properties offered which lies within the preferred operating perimeter.

The Joange Building Corporation (Bidder #2) submitted a proposal requiring an annual rental of \$6,750.00 during the basic lease term of ten (10) years. The premises are

SUBJECT: LEASE BID ANALYSIS - BROOKLYN, NEW YORK LO-2-64-27 4/8/64
Nostrand Station - Proposed

ANALYSIS OF BID PROPOSALS: (CONTD.)

located at 3842 Nostrand Avenue, approximately 450 feet south of the southwest corner of Nostrand Avenue and Avenue "Y", the southern limit of the preferred operating perimeter. The proponent has an unfinished store which he will complete as closely as possible to the plans and specifications furnished him. The premises are now 18' X 90' but he will eliminate under the Agreement to Lease the rear 15 feet to provide an area 18' X 75' or 1,350 square feet. The proposed rent of \$6,750.00 is equivalent to \$5.00 per square foot (\$6,750. + 1,350 sq.ft.). On an adjusted basis - as outlined for Bidder #1 - the indicated rental is \$4.63 per square foot. In this instance the Government will have the benefit of common use of two (2) blacktop parking areas comprising 31,596 square feet - one to the north and one to the south of adjacent buildings forming the taxpayer of which subject premises are a part - for patron parking. However, dispatch and receipt of mail would have to be through the lobby area since there is no provision for direct access to rear or side of proposed postal premises. As for the renewal options, the proponent is requesting \$5.50, \$5.50, \$6.00 and \$6.00 per square foot, during the four (4) separate and consecutive five (5) year optional renewal terms, respectively. These amounts are considerably higher than those offered by Bidder #1.

The third bid received was submitted by Wesley A. Roche, as partner with William Lande and Attorney for Nettie Match and Estate of Samuel Match (Bidder #3). The proposal of \$7,200.00 rental per annum for 1,417 square feet of area, net interior, is equivalent to \$5.08 per square foot during the ten (10) year basic lease term. Using the same criteria as above to arrive at an adjusted rental, computations reveal it to be \$4.71 per square foot. These premises are located at 3522-3524 Nostrand Avenue, approximately 715 feet north of the northern limit of the recommended operating perimeter. This proposal includes common use of a compacted gravel delivery area (approximately 4,100 square feet) to the rear of the postal premises which will permit dispatch and receipt of mail matter without interfering with the public lobby activities. Here too, as in the case of Bidder #2, the rental proposals under the four (4) separate and consecutive five (5) year optional renewal terms are higher than those requested by Bidder #1; they are \$5.22, \$5.37, \$5.50 and \$5.64 per square foot, respectively.

Summary of Bids Received:

<u>Bid #</u>	<u>Cost Per Square Foot With Improvements</u>					
	<u>10 Year Basic Lease</u> (unadjusted)	<u>5 Yr.</u> (adjusted)	<u>5 Yr.</u>	<u>5 Yr.</u> (unadjusted)	<u>5 Yr.</u>	<u>5 Yr.</u>
1	\$4.25	\$3.88	\$3.70	\$3.90	\$4.09	\$4.29
2	\$5.00	\$4.63	\$5.50	\$5.50	\$6.00	\$6.00
3	\$5.08	\$4.71	\$5.22	\$5.37	\$5.50	\$5.64

SUBJECT: LEASE BID ANALYSIS - BROOKLYN, NEW YORK
Nostrand Station - Proposed

LO-2-64-27

4/8/64

ANALYSIS OF BID PROPOSALS: (CONT'D.)

After giving consideration to ten (10) year amortization of costs for improvements and alterations to the proposed postal premises, and, based on information obtained during market rental data survey (see below), the proposal of Bid #1 appears fair and reasonable. Bids numbered 2 and 3 are on the high side.

RENTAL COMPARABLES:

A market rental survey was made and it disclosed the information tabulated below. It must be emphasized that stores in the area have been rented in "as-is" condition, requiring in many cases completion of construction of the "bare" premises (even to the extent of installation of heating equipment, lighting, etc.). Maintenance and utilities are responsibilities of the lessees in all instances reported. In addition, the leases in effect provide for tax clause stop gaps and insurance protection to the lessors.

The nearest rental comparables to Bid #1 are those numbered 4 through 15. Number 10 is adjacent to the postal premises offered. Number 11 is adjacent to Number 10 and together they comprise an area which duplicates premises offered by Bidder #1.

The comparables nearest the quarters proposed for a post office by Bidder #2 are numbered 16 and 17, while rental comparables numbered 1 and 2 are closest to the premises offered by Bidder #3.

Key No.	Type of Business	Size of Store	Inside Area (Sq.Ft.)	Annual Rent	Utilities Furn.	Net Rent	Net Rent per (Sq.Ft.)	Terms of Lease
1	Bagels and Rolls	14' x 88'	1,232	\$ 4,800.	None	\$ 4,800.	\$3.89	1962 - 1967
2	Drug Store	19' x 75'	1,425	\$ 4,500.	None	\$ 4,500.	\$3.15	1959 - 1971
3	Luncheonette	22' x 39'	858	\$ 4,500.	None	\$ 4,500.	\$5.24	1958 - 1966
4	Dry Cleaning	17' x 86'	1,426	\$ 5,700.	None	\$ 5,700.	\$3.99	1958 - 1968
5	Stationery	11' x 86'	946	\$ 3,600.	None	\$ 3,600.	\$3.80	1963 - 1965
6	Shoes	14' x 86'	1,204	\$ 4,800.	None	\$ 4,800.	\$3.98	1961 - 1968
7	Men's Clothing	13' x 75'	975	\$ 4,800.	None	\$ 4,800.	\$4.92	1963 - 1968
8	Meat Store	18' x 75'	1,350	\$ 4,800.	None	\$ 4,800.	\$3.55	1963 - 1966
9	Hair Stylist	15' x 75'	1,125	\$4,800.	None	\$ 4,800.	\$4.26	1963 - 1968

SUBJECT: LEASE BID ANALYSIS - BROOKLYN, NEW YORK
Nostrand Station - Proposed

LO-2-64-27

4/8/64

RENTAL COMPARABLES: (CONTD.)

<u>Key No.</u>	<u>Type of Business</u>	<u>Size of Store</u>	<u>Inside Area (Sq.Ft.)</u>	<u>Annual Rent</u>	<u>Util- ities Furn.</u>	<u>Net Rent</u>	<u>Net Rent per (Sq.Ft.)</u>	<u>Terms of Lease</u>
10	Chinese Laundry	14' x 52'	728	\$ 3,000.	None	\$ 3,000.	\$4.12	1963 - 1970
11	Drug Store	14' x 52'	728	\$ 3,300.	None	\$ 3,300.	\$4.53	1963 - 1973
12	Delicatessen	14' x 85'	1,190	\$ 4,800.	None	\$ 4,800.	\$4.03	1964 - 1966
13	Leased	14' x 85'	1,190	\$ 4,800.	None	\$ 4,800.	\$4.03	1964 - 1966
14	Clothing	14' x 85'	1,190	\$ 4,800.	None	\$ 4,800.	\$4.03	1964 - 1966
15	Variety Store (irr.-32' x 78')	2,696	\$10,800.	None	\$10,800.	\$4.00	1964 - 1967	
16	Pizzeria	14'6" x 75'	1,088	\$ 5,616.	None	\$ 5,616.	\$5.16	1959 - 1969
17	Greeting Cards	14'6" x 67'	972	\$ 6,204.	None	\$ 6,204.	\$6.38	1960 - 1972

For addresses, refer to photographs with this report.

OTHER PERTINENT FACTS:

With this file are strip maps and photographs keyed to comparables referred to above.

None of the bid proposals contains a tax escalation clause, the proposed post office quarters being one of several stores in each group of taxpayers.

Bidders #1 and #3 have submitted POD Forms 1413, Lease Bidder's Qualifications, which indicate that they are financially responsible proponents. No verification of their statements has been made by the undersigned. Concerning Bidder #2, it is suggested that a Performance Bond be required since information furnished is incomplete and local rumor has it that the corporation is in financial difficulty.

On POD Form 4866 (Abstract of Bids to Lease Quarters) the Postmaster, Brooklyn, N.Y. has recommended approval of the site offered by Bidder #1 and found unacceptable sites 2 and 3.

CONCLUSION:

Of the three (3) proposals received, the most advantageous to the Government is that of Brubrad Corporation (Bidder #1). This conclusion is based on present and future annual rentals requested, on physical dimensions of premises and as to its preferred location in the postal concept. No negotiations have been undertaken with any of the

SUBJECT: LEASE BID ANALYSIS - BROOKLYN, NEW YORK LO-2-64-27 4/8/64
Nostrand Station - Proposed

CONCLUSION: (CONTD.)

bidders in an attempt to obtain amended lower proposals. However, from personal discussions with representatives of Bidders #1 and #2, it is my belief that the proposals submitted by them are negotiable.

RECOMMENDATION:

It is recommended that an endeavor be made to obtain lower bid proposals. A word of caution - this action should be taken soon, and an early decision made since the three (3) owners are concerned about their vacant stores.

Licari
Joseph J. Licari

Attachments:

POD Form 1422) Orig. & 1 copy
POD Form 1422c)

POD Form 4866 - Postmaster, Brooklyn, N.Y. (Orig. & 1 copy)

Strip Map - Rental Comparables (2 copies)
Photographs Keyed to Comparables (2 sets)

Bid Proposal (#1) - Form 1400 (Orig. & 4 copies)
Form 1413 (Orig. & 1 copy)
Dwg. No. N.Y. 64-1518 dated 2/28/64 (5 copies)
Corporate Enabling Resolution (2 copies)

Bid Proposal (#2) - Form 1400 (Orig. & 4 copies)
Form 1413 (Orig. & 1 copy)
Dwg. No. N.Y. 64-1518 dated 2/28/64 (5 copies)
Corporate Enabling Resolution (2 copies)

Bid Proposal (#3) - Form 1400 (Orig. & 4 copies)
Form 1413 (Orig. & 1 copy)
Dwg. No. N.Y. 64-1518 dated 2/28/64 (5 copies)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRUBRAD COMPANY,

Plaintiff,

-against-

UNITED STATES POSTAL SERVICE,

Defendant.

AFFIRMATION IN OPPOSITION
TO CROSS-MOTION TO DISMISS

75 CIV. 325

State of New York) ss:
County of New York)

BRADLEY B. DAVIS, an attorney-at-law admitted to practice in the State of New York and in the within court, and the attorney for the within plaintiff, affirms the following under penalties of perjury in opposition to defendant's cross-motion to dismiss the complaint and in further support of plaintiff's motion for summary judgment.

The parties agree that the essential facts are not in dispute and therefore that this action is ripe for determination upon motion. However, defendant makes several serious errors in its understanding of plaintiff's claim.

To begin with, plaintiff is not seeking "reformation" in the sense of changing any word in the agreement between the parties. There is no claim that any word was inserted in the lease by "mutual mistake". Rather the claim is that the rent set forth, although perhaps broad enough to be read in several directions, in fact obviously referred to the currency value at the time of the agreement, and certainly did not anticipate the effective diminution of the rent by the willful act of one of the parties to the lease. This presents a situation analogous to that in Chicago, Minneapolis & St. Paul Ry. Co. v. Hoyt, 149 U.S. 1, 13 S.Ct. Rep. 779 where the court stated, in material part:

REPLY AFFIDAVIT IN SUPPORT OF BRUBRAD

"Where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract is made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

In fact, neither party contemplated that the government might seek to effectively lower its rent by devaluing the dollar since this did not even become an issue until a number of years after the lease was executed. (If, indeed, the government did contemplate this possibility, then it was guilty of at least concealment and perhaps fraud in not disclosing this in its conditions of bid or in the lease, and this likewise would give rise to the reformation sought here.)

Defendant is, to say the least, ambivalent on whether or not it falls within the purview of the "United States". On Point II of its brief, it argues that "defendant is the United States Postal Service, not the 'United States Government'; however, in Point IIIA, it seeks dismissal because of a statute of limitations for actions "against the United States".

Whether or not the United States Postal Service is any more independent of the "United States" than are a host of other governmental and quasi-governmental agencies need not be determined in the case at bar since the underlying lease which is the basis of this action was undisputedly entered into between plaintiff and the United States of America. Whatever rights the parties may have in this action are determined by that lease.

Whether the huge expansion in government regulation of the economy, ranging from price and wage supports and controls to taxes to interest to money supply, has created a situation so different from that existing in 1918 when the Columbus Railway case was decided that inflation by itself would be deemed an action by the United States

REPLY AFFIDAVIT
IN SUPPORT OF BRUBRAD

and therefore grounds for the two types of relief sought herein also need not be determined because the gravamen of the complaint is not inflation but devaluation which undisputedly is a willful act of the United States. Because of the Perry holding, devaluation by itself is not a ground to award damages: there also must be a showing of inflation. Therefore, while inflation is a necessary precondition for the relief sought here, it is not the gravamen of the underlying complaint.

Moreover, under Perry, in addition to inflation and devaluation, free availability of silver for dollars must be shown.¹ For this reason, defendant's arguments of statute of limitations and laches do not hold water: not until January 1, 1975 did we have the combination of the three factors required by Perry for awarding damages: devaluation, inflation and free exchangibility.

Indeed, even were this not the case, there would be no basis for dismissal on the grounds either of laches or statute of limitations.

For one thing, this case concerns a continuing injury (See, e.g., Accardi v. U.S., 356 F. Supp. 218 (SDNY 1973)) which is quite distinct from the cases cited in defendant's brief which involve an injury occurring at a particular point in time. Moreover, relief is requested only from the date of the complaint.

The argument under III-C of defendant's brief (Tucker Act) likewise has no merit because (1) 28 U.S.C. 1339 specifically gives district courts original jurisdiction "of any civil action arising under any Act of Congress relating to the postal service", and (2) in no event could there be a damage award here in excess of \$10,000.

The final argument of defendant, that the consequences of giving relief would be "truly overwhelming" should be given short shrift: the consequences of Marbury v. Madison, the desegregation, and the one-man-one-vote cases, were indeed truly overwhelming, but in none of those

REPLY AFFIDAVIT IN SUPPORT OF BRUBRAD

instances did this cause the court to shirk its duty. Whether, given the fact that most government contracts are of relatively short range and those which are not are often cost-plus or otherwise subject to renegotiation, in fact this will make much of a dint in federal spending is in no way specifically shown and subject to serious doubt. What would be truly overwhelming is if the court accepted the government's position and held that the government could unilaterally alter the fundamental terms of its contracts in defiance of our entire tradition of law. This would in no way prevent the government from future revaluation of the dollar: it simply would mean that the government could not consider this as a means to effectively unilaterally diminish its contractual obligations.

For the above reasons, the cross-motion should be denied and the motion for summary judgment granted.

Dated: New York, N.Y.
August 27, 1975


BRADLEY B. DAVIS

SECOND CIRCUIT COURT

BRUBRAD COMPANY

against

Plaintiff

UNITED STATES POSTAL SERVICE

Defendant

Index No.

**PROOF OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned, attorney at law of the State of New York ~~#1441-1~~, that deponent is being duly sworn, deposes and says: } that deponent is attorney(s) of record for

appellant
Deponent is not a party to the action, is over 18 years of age and resides at

1235 Park Avenue, New York, N.Y.

That on the 26 day of December

19 75 deponent served the annexed

joint appendix
on David Trager, United States Attorney

attorney(s) for appellee

in this action at 225 Cadman Plaza East, Brooklyn, N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.

(The undersigned attorney affirms the foregoing statement to be true under the penalties of perjury.)

Sworn to before me ~~01/01/75~~
this 26 day of December

19 75

Clair L. Sloane
CLAIR L. SLOANE
Notary Public, State of New York
No. 31-4902625
Qualified in New York County
Commission Expires March 30, 1976

The name signed must be printed beneath
BRADLEY B. DAVIS

